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In The

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1499

MORRIS WEINTRAUB,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. ———

MORRIS WEINTRAUB,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your Petitioner, Morris Weintraub, respectfully petitions this Honorable Court for a Writ of Certiorari to review a Judgment and Opinion in the United States Court of Appeals for the Sixth Circuit rendered in this cause.

OPINIONS BELOW

A Judgment was entered by the District Court on January 5, 1977 and is reported at 77-2 USTC ¶ 9576. The Opinion of the Sixth Circuit Court of Appeals (App. F, 18a) was filed on December 19, 1979, and is not yet reported.

JURISDICTIONAL STATEMENT

The date of the Judgment of the Court of Appeals sought to be reviewed and the date of its entry is December 19, 1979. (App. G, 45a). An Order of the Court of Appeals denying a timely Petition for Rehearing was entered February 4, 1980. (App. H, 47a). This Court's jurisdiction is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the limitations provision of Title 26 § 6502 of the United States Code apply to actions by the United States against non-taxpayers to collect money or property belonging to the taxpayer in accordance with the provisions of Title 26 § 6332 (c) of the United States Code?

2. Whether the United States as a litigant should be permitted to rely upon the doctrine that laches does not apply against the sovereign in order to excuse, without cause, the nearly thirteen year delay in bringing the instant action, or should it be required to conform its actions to those required of its citizens?

STATUTES INVOLVED

The statutes involved in this matter are 26 USC § 6502 and 26 USC § 6332 which are set forth in this Petition and the Appendix thereto.

STATEMENT OF THE CASE

On May 2, 1963, the Internal Revenue Service assessed against one Frank J. Andrews excise taxes in the approximate amount of $688,000.00. In an effort to collect a portion of those assessed taxes, the Petitioner, Morris Weintraub, was served with a Notice of Levy on May 3, 1963. This Notice of Levy sought to attach a debt allegedly due Andrews from Weintraub as a result of a loan by Andrews to Weintraub. Weintraub denied that he owed Andrews anything at the time the Notice of Levy was served upon him and, consequently, refused to pay over any money to the Internal Revenue Service. No further action was taken by the United States save and except the service upon Weintraub of a "final demand" on May 21, 1963, until he was indicted on April 22, 1964, for willfully failing to honor the levy in question. The matter was tried in the United States District Court for the Eastern District of Kentucky and ended in Weintraub's acquittal on September 24, 1965.

Subsequent to his acquittal in 1965, no action was taken by the United States to in any way collect the alleged debt until January 22, 1976, when the Complaint in the instant action was filed in the United States District Court for the Southern District of Ohio. (App. A, 1a). The issue of the application of the statute of limitations and the doctrine of Laches was presented to the District Court for its consideration but rejected by the Court without opinion. The case was then presented to the Jury with the only issue to be determined being the existence or non-existence of the debt on May 2, 1963.

While the facts surrounding the creation of the debt of Weintraub to Andrews are not essential to a determination of the issues presented to this Court for consideration

they are perhaps helpful in understanding the reason for raising the limitations and laches issues.

In 1959 the Petitioner and his brother contracted to purchase two parcels of real estate near Phoenix Arizona. One of those parcels was purchased from Cornell University for $672,000.00 through the Arizona Title and Trust Company. This tract required that the purchasers pay $10,000.00 upon the signing of the agreement and another $184,880.00 upon the close of the escrow approximately three months later. The balance of the purchase price was payable in five equal installments of $95,424.00 each, plus interest.

While the Petitioner supplied the initial payment of $10,000.00, the amount needed to close the escrow was borrowed from two private individuals. As security for the repayment of that amount, the Petitioner and his brother executed assignments of their interest in the real estate held by the trust company, plus their interest in the other parcel. Petitioner also obtained an exclusive option to "repurchase" both parcels upon the repayment of the $185,000.00 plus interest for a total of $285,000.00. There were numerous documents prepared to reflect these agreements; however, by agreement of the parties they were not filed with the trust company at that time.

It was the Petitioner's desire to sell the tract purchased from Cornell University prior to the time the first installment payment of $95,424.00 plus interest was due in July, 1960. However, despite such plans the Petitioner and his brother were unable to sell either parcel prior to the time the first installment payment was due. After obtaining numerous extensions from Cornell University on this payment it appeared that the University would not extend the payment beyond September 1960. On September 6, 1960, the Petitioner borrowed from Frank J. Andrews the

sum of $135,000.00 which was the approximate amount needed to make the payment, plus interest. The Petitioner and his brother issued to Andrews their note in the amount of $135,000.00 plus interest. The note pledged as security the interest of the Petitioner and his brother in the two parcels of real estate.

Again the intention of the Petitioner and his brother was to sell the two parcels of real estate; however, because of difficulties with the flood control authority, that could not be accomplished. While Andrews wanted the loan repaid that was impossible unless the real estate could be sold. However, in May 1961, Petitioner did pay to Andrews the sum of $20,000.00 ($5760.00 interest, $14,240.00 principle). In May 1962 the Petitioner assigned to Andrews a "77.17" percent interest in the two parcels of real estate in return for a cancellation of the note. (At trial the United States questioned the validity of these assignments and argued that they were actually executed after the service of the Notice of Levy.) The Petitioner and his brother were never able to sell the real estate and after the filing of several suits in Arizona the Court held that the individuals who had provided the initial $184,880.00 (plus several installment payments) were entitled to the real estate based upon the assignments given to them at the time the $184,880.00 was advanced. The Petitioner, his brother, and Andrews were held to have no interest in the real estate.

It was on the basis of the assignment to Andrews of the 77.17 percent interest and the cancellation by Andrews of the balance due on the note, that Weintraub denied that any money was owing to Andrews on May 2, 1963, and therefore refused to honor the levy served upon him on that date.

Petitioner, as noted above, was indicted in 1964 and

tried and acquitted in 1965 on criminal charges stemming from the same factual situation set forth above. Also, as was noted above, the United States took no action whatsoever vis-a-vis this alleged debt until the filing of the action in the District Court on January 22, 1976, 10 years later.

However, during that particular period of time, a number of things did happen. First of all, Morris Weintraub destroyed most, if not all of the records that he had in connection with this matter, and the remainder could not be found, and he was, therefore, without any documents whatsoever when this case was filed in January, 1976. But perhaps even more important than that are the deaths of numerous parties who were involved in the rather complicated transaction that took place from 1959 through 1963. First of all, Joseph Fischer, the Special Agent of the Internal Revenue Service who worked the criminal case involving the Petitioner died on August 13, 1970; Daniel W. Davies, the attorney who represented Morris Weintraub in the criminal action died on February 3, 1975; Winifred Weintraub, the Petitioner's sister-in-law and a party to many of the transactions died during the Summer of 1971. Perhaps the most important party to these transactions, Frank J. Andrews, died on December 21, 1974, approximately one year before the suit was filed by the United States. While the Petitioner's brother was still alive at the time the suit was filed and at the time of trial he was nearly seventy-five years old and in failing health. His memory of the events surrounding these transactions in 1959 through 1963 was almost non-existent; and he subsequently died on March 29, 1977, approximately two months after the trial.

REASONS FOR ALLOWANCE OF THE WRIT

1. THE LIMITATIONS PROVISION OF TITLE 26 § 6502 OF THE UNITED STATES CODE SHOULD APPLY TO ACTIONS BY THE UNITED STATES AGAINST NON-TAXPAYERS TO COLLECT MONEY OR PROPERTY BELONGING TO THE TAXPAYER IN ACCORDANCE WITH THE PROVISIONS OF TITLE 26 § 6332(c) OF THE UNITED STATES CODE.

The complaint in the instant action seeks to collect the taxes owed by another individual, Frank Andrews, from the Petitioner. The authority for the government's action is section 6532 of the Internal Revenue Code. (26 USC § 6532) That section provides in part:

> Any person who fails or refuses to surrender any property or rights to property subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest upon such sum at a rate of 6% pe annum from the date of such levy. Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made. (26 USC § 6532 (c) (1))

Section 6532 does not contain any limitations section, nor in all candor does the collection chapter of the Internal Revenue Code contain any limitation section which specifically refers to section 6532. However, the same may be said for any of the other sections relating to the collection of taxes. If there is to be any limitation period then the

Petitioner urges that the provisions of section 6502 (26 USC § 6502) must therefore apply. Section 6502 provides as follows:

> COLLECTION AFTER ASSESSMENT
>
> (a) Length of period. — Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun —
>
> (1) within 6 years after the assessment of the tax, or
>
> (2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).
>
> The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by this subsection during which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against the taxpayer.
>
> (b) Date when levy considered made. — The date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335 (a) is given.[1]

There was never any agreement between the Internal Revenue Service and the Petitioner, or the Internal Revenue Service and the taxpayer, Frank Andrews, to extend

[1] 26 USC 6535(a) provides in part "that as soon as practicable after the seizure of property, a notice in writing shall be given by the Secretary or his delegate to the owner of the property . . . ."

the period of limitations. Consequently we are concerned with the provisions of sections 6502 (a) (1) and 6502 (b). The Respondent, in its response to the Petitioner's motion for summary judgment filed before the District Court, took the position that it was not necessary to file suit in six years since the levy had been made within that period. However, this position is just not supported by the record in this case. As noted above, section 6502 (b) provides that the levy is considered made on the date that the notice of seizure is given. This record is devoid of any such notice, simply because none was ever given to the taxpayer Andrews or to the Petitioner.

The opinion of Judge Celebrezze in the Circuit Court of Appeals below relied upon the theory of constructive possession to support his opinion that the provisions of section 6502 did not apply. (App. F, 18a, at 34a) However, the two cases relied upon by Judge Celebrezze to support this theory, while discussing the theory of constructive possession do not deal with that theory as it would apply to the limitation provisions of § 6502.

The reliance by the Court below of this Court's decision in *Phelps* v. *United States,* 421 U.S. 330 (1975) and the decision of the Third Circuit Court of Appeals in *In re Cherry Valley Homes, Inc.,* 255 F. 2nd 706 (3rd Cir. 1958) is inappropriate. *Phelps,* supra, involved a situation where the taxpayer assigned, for the benefit of its creditors, all of its assets to a trustee, who after converting the assets to cash was promptly served with a notice of levy. Then an involuntary petition in Bankruptcy was filed, the taxpayer was adjudicated a bankrupt and a receiver appointed.

Within a month after the Bankruptcy Petition was filed, the money in the hands of assignee was applied for by the receiver and opposed by the Internal Revenue Service.

The Referee in Bankruptcy held for the receiver. This position was sustained by the District Court, but reversed by the Seventh Circuit, a decision that was concurred in by this Court. The assignment for the benefit of creditors was made on June 28, 1971. This Court filed its opinion on May 19, 1975, less than four years after it all started!

Within less than sixty days after the notice of levy was served upon the assignee, a proceeding was instituted in court, namely, the proceeding by the receiver in the bankruptcy action to compel the assignee to surrender the money he had collected. The Internal Revenue Service joined this proceeding and the issue of which of the claimants was entitled to the money was litigated. The Court, in its holding, found that the Internal Revenue Service was in constructive possession of the funds in the hands of the assignee when the notice of levy was served. No Court in that case ever reached the issue of whether the United States was required to institute legal proceedings within six years to enforce the levy; for quite simply the issue was not raised, and frankly was not there to be raised.

Likewise, in *Cherry Valley Homes, Inc., Supra,* the issue of whether the United States was required to institute suit within six years was not presented to the Third Circuit. In *Cherry Valley Homes, Inc., Supra,* the levy was served on December 3, 1956, and a voluntary petition in reorganization under The Bankruptcy Act was filed on May 28, 1957. It was in the forum of this bankruptcy action that the issue was litigated and finally resolved by the Third Circuit, less than two years after the notice of levy was served.

Contrast these facts with the facts in the instant case. No proceeding in court was instituted by any party involving the subject of this levy until the one started by the

United States which is the subject of this litigation. It is difficult to believe that this Court would have reached the same result that it reached in *Phelps, Supra,* had the assignee turned the money over to the receiver, the court determined the priority of all other claims, paid the money to the other claimants and then, let us say 13 years later, the Internal Revenue Service would have started a suit pursuant to section 6332 to enforce the levy against the assignee. But if the reasoning of the Sixth Circuit in the instant case is to be followed, the assignee would be liable to pay the money to the Internal Revenue Service, since they had constructively seized it 13 years prior to that time. It is bad enough that the assignee could be exposed to double liability for six years, but the decision of the Sixth Circuit would make the assignee's grandchildren liable for money he had paid into a Bankruptcy Court decades before, as was pointed out by Judge Merritt in his dissent. (App. F, 41a-44a). That just cannot be a correct interpretation of the law!

This Court has held that statute of limitations are ". . . designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time." *Guarantee Trust Co.* v. *United States,* 304 US 126 (1938), at page 136. The reason behind this purpose is clear to everyone – the only generally notable exception to the requirements of the statute of limitations are those involving fraudulent attempts to conceal the existence of the claim, then the statute usually resolves to a period of time after the claimant becomes aware that the claim exists; however, the United States is certainly not in the position in this particular case to establish that in some manner the Petitioner fraudulently or otherwise concealed the existence of the debt to Andrews from the Internal Revenue Service or any

other person. First of all, many of the documents evidencing the debt were a matter of public record, but more importantly, Respondent clearly established that it had knowledge of the facts in May, 1963, when it served the Notice of Levy, and certainly in 1964 when it indicted Petitioner, and in 1965 when the case involving that indictment was tried. Moreover, Respondent cannot suggest any valid reason why it was necessary for them to delay nearly thirteen years after the service of the levy to file the instant action.

The opinion of Judge Celebrezze below cites the maxim that the sovereign is not bound by the terms of statutes of limitations unless expressly indicated in the statute. The Petitioner would agree that generally this is a correct statement of the law as it exists today and as it has existed since this Court decided *United States* v. *Nashville R.R. Co.,* 118 U.S. 120 (1886). Judge Celebrezze's opinion continues to reason that section 6502 does not apply not only because it does not make reference to section 6532 specifically, but also because 6502 refers to the collection of a tax and what was sought to be collected in the instant case was not a tax ". . . but rather is to enforce the personal liability for failure to surrender property after receiving a notice of levy." (App. F, 31a).

Section 6502 does not mention any collection statute, but the cases are legion that the Internal Revenue Service could not collect from the taxpayer own funds, held by him, after the expiration of the six year period. If the reasoning used by the Court below is to be followed then section 6502 is meaningless since no statutes are mentioned, it does not apply to any. Additionally, the opinion below reasoned what the Respondent sought to collect was not a tax, barred by section 6502, but rather the personal obligation of the Petitioner. It was not Morris Weintraub that owed the

Respondent money, it was Frank Andrews, and he owed that money not because of some contractual liability but because of taxes that were assessed against him on May 2, 1963.

While the Petitioner cannot point to any cases specifically holding the provisions of section 6502 applicable to section 6532 the soundness of reasoning its application cannot be denied. The Court below dismissed the reasoning of the United States District Court for the Eastern District of Tennessee in *U.S.* v. *Home Beneficial Life Insurance Company, et al.,* 31 AFTR 73-1084, 73-1 USTC 9345 wherein that Court held that section 6502 did apply to a suit by the United States to enforcement of a judgment previously obtained by the United States. The authority for the action by the United States was section 6322 (26 USC § 6322) and like section 6532 it is not mentioned in section 6502 and in the very narrow sense the action was not one to collect a tax but was an action to enforce a judgment.

The opinion of Judge Celebrezze completely ignores what the Petitioner suggests is the only logical reading of section 6502. That section is a limitation on the collection of taxes, it does not distinguish between collection of those taxes from monies held by the taxpayer himself or monies held by third persons. Section 6502 was an attempt by Congress to put some time limit on the efforts of the Internal Revenue Service.

> "The Court reaches this anamalous result by holding that the statute, § 6502, 'only concerns actions against taxpayers' and 'not actions . . . against third parties in possession of a taxpayer's property or property rights,' although it acknowledges that there is 'no case expressly holding that § 6502 is not applicable.' No attempt is made to discuss the irrational conse-

quences of this conclusion. The Court does not even attempt to parse or analyze the language of the statute in order to justify the conclusion. It simply quotes 'the rule *nullum tempus occurrit regi*' ('time does not run against the King') and combines it with a wonderful legal fiction, the doctrine of 'constructive possession' of personal property . . . .

Not even the common law during its darkest days of legal formalism and rigid adherence to fiction and abstraction took the doctrine of 'constructive possession' this far. (Citing Pierson v. Post, 3 Caines 175, 2 Am. Dec. 264 (N.Y. 1805)

In the instant case, the Court's conclusion means that 'quarrels and litigation' over tax claims with an omnipresent government will never end, even in the lifetime of our children's children unto the seventh generation. If the fox in Pierson v. Post was not in the constructive possession of the pursuer, I do not see so many years later why we should struggle with Shaperpeareaan (sic) imagination to locate the money Mr. Weintraub owed to Mr. Andrews in the 'constructive possession' of the government. Mr. Weintraub's fox was invisible, an incorporeal hereditament. If it ever existed, it was killed and skinned long ago. The trail has grown cold. The participants in the hunt who have not already died have grown old and forgotten the facts. After all these years, only the government's appetite for the chase remains. But in my judgment, they should sound the horn in other fields and send the hounds to follow trails which are not so stale, for *lex dilationes semper exhorret* ('the law abhors delay'), 2 Coke Inst. 240, is a better rule than *nullum tempus occurrit regi*." (Dissent of Judge Merritt, App. F, 41a-44a)

2. THE UNITED STATES AS A LITIGANT SHOULD NO LONGER BE PERMITTED TO RELY UPON THE DOCTRINE THAT LACHES DOES NOT APPLY AGAINST THE SOVEREIGN IN ORDER TO EXCUSE, WITHOUT CAUSE, THE NEARLY THIRTEEN YEAR DELAY IN BRINGING THE INSTANT ACTION, BUT SHOULD BE REQUIRED TO CONFORM ITS ACTIONS TO THOSE REQUIRED OF ITS CITIZENS.

The Petitioner concedes that with respect to the issue of laches the weight of the case authority generally is against him. However, surely at some point the need to protect the citizens as a whole from the mistakes and omissions of their public servants is outweighed by the need to protect the individual citizen from the callous indifference of the public servant. Perhaps it is time to reconsider this Court's position on the issue of laches as it applies to the sovereign and to create a more realistic rule, one that at the very minimum requires the United States to demonstrate a good faith reason why its delay should be excused.

Generally, in order to sustain a claim of laches as a defense the party raising such a defense must establish two factors: One, that there was an unreasonable delay by the claimant in moving to enforce his claim; and Two, that that delay resulted in prejudice to the party against whom the claim is made. *Afro American Petroleum League* v. *Duck*, 503 F. 2nd 294 (6th Cir. 1974) and *American Home Products Corp.* v. *Lockwood Manufacturing Co.*, 483 F. 2nd 1120 (6th Cir. 1973)

The instant case contains ample evidence, in fact, overwhelming evidence, of the existence of both circumstances.

First of all, the delay in filing this case until January 22, 1976, was approximately thirteen years from the date on which the Notice of Levy was first served upon the Petitioner on May 3, 1963. The fact that the delay was unreasonable is further evidenced by the fact that during this period of thirteen years, the United States was not conducting an active investigation, it was not attempting to locate documents necessary to prove its claim, it was not doing anything, especially since Petitioner was acquitted of the criminal charges in 1965. All of the documents introduced as Joint Exhibits, as Plaintiff's Exhibits or, for that matter, the Defendant's Exhibits, were obtained from the files of the United States, and all those documents were in those files since at least 1965. Nowhere has it been suggested that there existed an adequate reason why the United States waited from 1965 until 1976 to file the action to collect this tax owed by Andrews.

The second requirement, that is, that the party asserting the defense of laches be prejudiced by the delay is equally evident. Not only were all of the records maintained by the Petitioner gone, the witnesses to the transactions were also for the most part dead. The one person who could have resolved any questions concerning the acceptance of assignments of an interest in the land as satisfaction of the debt, Frank J. Andrews, was also dead. Likewise, it was Andrews who could have established the dates said assignments were signed, and the fact that it was in May, 1962 (one full year *before* the service of the Notice of Levy on Weintraub in *May, 1963*) that Andrews accepted the Assignment and agreed to and acknowledged that the Weintraub debt to him was satisfied; so that in May, 1963, when Weintraub was served with the Notice of Levy, he owed Andrews nothing. (App. 14a).

Perhaps it was more than just coincidence that Frank

J. Andrews died on December 21, 1974, and then about 13 months later the United States filed this action against Weintraub. Or could it be that the death of Andrews rekindled the interest of the United States after Andrews, while he was living, refused to be coerced by the Government.[2] But regardless of what caused the rekindling of that interest, Petitioner Weintraub was substantially prejudiced by this unreasonable delay. See Motion (for Summary Judgment) and Affidavit in Support Thereof. (App. C and D, 9a and 11a).

This Court has, in the limited area of commercial paper, held that the United States can be held accountable for its delay. In *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943) this Court considered the question of whether the issue of laches applied in a situation where the United States was the drawee of a check, and upon learning of the forgery failed to give prompt notice of that discovery to the bank that had negotiated the check. In *Clearfield Trust, Supra,* this Court stated:

> The National Exchange Bank case went no further than to hold that prompt notice of discovery of the forgery was not a condition precedent to suit. It did not reach the question whether lack of prompt notice might be a defense. We think it may. If this is shown that the drawee on learning of the forgery did not give prompt notice of it and that damage resulted, recovery by the drawee is barred. (citations omitted) The fact that the drawee is the United States and the laches those of its employees are not material. Cook v. United States, 91 U.S. 389 (19) The United

[2] See App. 14a for a printed copy of a ***handwritten*** document found in the Government files giving instructions to "get Screw to testify against Morris in exchange for Gov'ts leaving Foppe property alone.—". Note: "Screw" is Frank J. Andrews; "Foppe" is Andrew's son-in-law; "Morris" is Petitioner Weintraub. This handwritten document never got to the jury.

States as a drawee of commercial paper stands in no different light than any other drawee.

Clearly then, the United States can, at least in the field of commercial paper, be guilty of laches. Likewise, perhaps the door has been left ajar in a broader sense by this Court in *Costello* v. *United States,* 365 U.S. 265 (1961) wherein this Court while rejecting the arguments made by Costello regarding the issue of laches did so, not with the general statement that laches may never apply against the United States, but did so on the basis that Costello did not meet the requirements of showing sufficient prejudice by reason of the government's delay. *Costello, Supra,* at page 281.

It can only be suggested to this Court that the instant case presents a most flagrant abuse of the exemption that the United States has enjoyed. A delay by the United States of almost thirteen years since it discovered its potential claim, and since it assembled all the evidence in connection with it; a delay not necessitated by any investigation or any research; a delay which saw the death of the Petitioner's key witness, Andrews, who was the only witness that would have, or could have substantiated the testimony of the Petitioner; a delay that further saw the destruction and loss of the records Petitioner once had concerning this transaction; and a delay that certainly must have affected and, in the case of E. A. Weintraub, did affect the ability of witnesses to recall events and details concerning transactions that were involved and complicated, can not be justified.

If ever a case reeks with injustice to a party litigant, this is the case! It is a case where this Court should declare that under the circumstances of the unreasonably long delay of almost thirteen years on the part of the United

States, and the resulting prejudice to Petitioner, the action is barred by the equitable doctrine of laches.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

CIVIL ACTION NO. C-1-76-32

UNITED STATES OF AMERICA,

Plaintiff,

v.

MORRIS WEINTRAUB,

Defendant.

COMPLAINT

(Filed January 22, 1976)

For claim against the above-named defendant, plaintiff alleges:

I

This is a civil action brought to obtain a judgment against Morris Weintraub for his failure to honor a levy served upon him for monies owed by him to the taxpayer, Frank J. Andrews, at the date of the levy; the levy was made upon defendant by a delegate of the Secretary of the Treasury to partially satisfy said taxpayer's outstanding tax liabilities.

II

This action, commenced pursuant to Section 7401 of the Internal Revenue Code of 1954, is brought at the direction of

the Attorney General of the United States, with the authorization, sanction and at the request of the Chief Counsel of the Internal Revenue Service, a delegate of the Secretary of the Treasury.

III

Jurisdiction of this action is conferred upon this Court by Title 28, United States Code, Sections 1340 and 1345, and Section 7402 of the Internal Revenue Code of 1954.

IV

Defendant is within the jurisdiction of this Court and may be found at 1410 Springfield Pike, Cincinnati, Ohio.

V

On May 2, 1963, a delegate of the Secretary of the Treasury, in accordance with law, made a Federal excise-wagering tax assessment against Frank J. Andrews and issued a notice and demand for payment thereof; however, as of this date the said sum (and additional sums which were assessed against taxpayer), namely $688,734.41, remains due and payable.

VI

At the time of the assessment described in the preceding paragraph a lien arose in favor of the United States upon all property and rights to property, wherever situated, belonging to Frank J. Andrews, including the property described in Paragraph VIII *infra*.

VII

On May 3, 1963, a duly-authorized delegate of the Secretary of the Treasury, pursuant to Section 6332(a) of the Internal Revenue Code of 1954, served a notice of levy for property or rights to property held by defendant belonging to the taxpayer, Frank J. Andrews, on defendant.

VIII

Defendant, on May 3, 1963, was obligated to taxpayer in the sum of $135,000 which sum had been at an earlier date obtained by defendant as a loan from taxpayer; nevertheless defendant without reasonable cause has refused to honor the levy described in the preceding paragraph and such refusal has continued to the date of this complaint.

WHEREFORE, plaintiff demands that judgment be entered against defendant in the amount of $135,000 as provided by Section 6332(c)(1) of the Internal Revenue Code of 1954, plus interest from May 4, 1963, and the costs of this action.

WILLIAM W. MILLIGAN
United States Attorney

By: /s/ GERALD F. KAMINSKI
Assistant United States Attorney

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

CIVIL ACTION NO. C-1-76-32

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORRIS WEINTRAUB,

Defendant.

ANSWER AND JURY DEMAND

(Filed July 23, 1976)

Defendant, Morris Weintraub, for answer and other defense to the Complaint of plaintiff, United States of America, admits and denies the allegations thereof as follows:

(1) The Complaint does not state facts sufficient to constitute a cause of action;

(2) Denies so much of paragraph I as alleges that defendant failed to honor a levy made by plaintiff or it delegates; denies that he was indebted to Frank J. Andrews;

(3) For want of information denies the allegations of paragraph II;

(4) Admits the allegations of paragraphs III and IV;

(5) For want of information denies the allegations of paragraph V;

(6) Denies the allegations of paragraph VI;

(7) Admits the allegations of paragraph VII;

(8) Denies the allegations of paragraph VIII.

(9) For further answer defendant says that on April 22, 1964, plaintiff commenced a proceeding in the United States District Court for the Eastern District of Kentucky in the form of an indictment in a cause numbered 10,417, wherein it alleged of and against this defendant as follows:

"COUNT ONE

That from on or about May 3, 1963, and continuously thereafter up to the date of the filing of this indictment, in the Eastern District of Kentucky, and within the jurisdiction of this Court, FRANK J. ANDREWS and MORRIS WEINTRAUB, the defendants herein, with intent to evade and defeat the collection of taxes assessed against the defendant Frank J. Andrews by the United States Treasury Department, Internal Revenue Service, unlawfully, willfully and knowingly concealed and were concerned with concealing a debt in the amount of one hundred twenty thousand, seven hundred and sixty dollars ($120,760), more or less, owed to the defendant Frank J. Andrews by the defendant Morris Weintraub, said debt being property upon which a levy was authorized and made under the provisions of Section 6331 of Title 26 United States Code, all in violation of Section 7206(4) of Title 26, United States Code.

COUNT TWO

On or about the 6th day of August 1963, in Newport, Kentucky, in the Eastern District of Kentucky, Morris Weintraub, the defendant, unlawfully, willfully and knowingly made a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of a department of the United States, namely, the Treasury Department, Internal Revenue Service, to the effect that in May 1962 he had as-

signed a percentage interest in certain land to one Frank J. Andrews in cancellation of indebtedness from Morris Weintraub to the said Frank J. Andrews, whereas in truth and in fact, as the defendant then and there well knew ,he had not made such an assignment to the said Frank J. Andrews in May 1962. (Title 18 U.S.C., Section 1001)

COUNT THREE

On or about the 7th day of August 1963, in Newport, Kentucky, in the Eastern District of Kentucky, Morris Weintraub, the defendant, unlawfully, willfully and knowingly made a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of a department of the United States, namely, the Treasury Department, Internal Revenue Service, to the effect that he was not indebted to one Frank J. Andrews, whereas in truth and in fact, as the defendant then and there well knew, he was indebted to the said Frank J. Andrews. (Title 18 U.S.C., Section 1001)

A TRUE BILL

GEO. C. CLINE
United States Attorney

HERBERT CALDWELL
Foreman"

To said indictment defendant joined issue with plaintiff therein by his plea of "not guilty" and upon said issue so joined upon trial by said court and jury, at which trial this defendant testified, defendant was acquitted by verdict of said jury, returned in open Court on September 23, 1965, in these words:

"We the jury find the Defendant Morris Weintraub *not guilty*, on all three counts contained in this indictment. (Emphasis that of jury.)

GARNETT H. HILL
Foreman"

Upon said verdict judgment of acquittal was by said court duly entered and defendant says that the issue poined in said cause was and is identical with issue joined herein, and that the cause of action attempted to be asserted in the Complaint herein has been by said verdict and judgment therein judicially decided adversely to the claims of plaintiff in this cause and by reason thereof plaintiff is estopped to relitigate said issue.

(10) For further defense defendant says that plaintiff delayed from May 3, 1963, until January 22, 1976, a period of twelve years, eight months and nineteen days, the institution of the within civil action, which now deprives defendant of the testimony of witnesses now deceased and records not now available and which may have been destroyed since September 23, 1965; that said witnesses when in being were Frank J. Andrews, who died December 21, 1974; Mike Mazzaro, who died October 5, 1974; Joseph Fischer, who died August 13, 1970; Winifred Weintraub, who died in June or July, 1971; Daniel W. Davies, who died April 19, 1975; and Honorable Mac Swinford, Judge, United States District Court for the Eastern District of Kentucky, who died February 3, 1975; and said records contained, inter alia, a true copy of the document dated May 8, 1962, wherein and whereby defendant's debt to Andrews was extinguished, all to the unconscionable prejudice of defendant occasioned as aforesaid by LACHES of plaintiff in its unwarranted zeal to overreach defendant.

(11) As a further and additional defense, and by reason of the facts set forth in paragraph (10) of this Answer, which are reiterated and incorporated herein by reference, defendant states that plaintiff is in equity ESTOPPED from asserting the cause of action set forth in the Complaint.

(12) For further defense, defendant says that the sum of $135,000.00 referred to in the Complaint, was borrowed by this defendant from Frank J. Andrews on September 6, 1960, and that $133,593.69 thereof went directly for the payment by

this defendant of sums due on the land and real estate which in May, 1962 this defendant assigned a percentage interest to said Frank J. Andrews, in cancellation and extinguishment of his then indebtedness to the said Frank J. Andrews.

(13) Further, defendant says that the Complaint is a spurious and sham pleading filed in bad faith in that plaintiff by and through its agents and attorneys are possessed of documentary proof positive of the falsity of paragraph VIII thereof where it is alleged that defendant on May 3, 1963, was indebted to Frank J. Andrews in the sum of $135,000.00, and said allegation is made by said agents and attorneys to mislead the court and harass defendant.

(14) Defendant reserves the right to amend this pleading upon completion of discovery.

WHEREFORE, Defendant prays for TRIAL BY JURY; that the Complaint be dismissed, and for his costs herein expended and for all other relief.

/s/ WILLIAM C. OLDFIELD
211 East Fourth Street
Covington, Kentucky 41011

/s/ A. D. GOLDBERG
1318 First National Bank Bldg.
Cincinnati, Ohio 45202

ATTORNEYS FOR DEFENDANT

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL ACTION NO. C-1-76-32

UNITED STATES OF AMERICA

PLAINTIFF

vs.

MORRIS WEINTRAUB

DEFENDANT

MOTION

(Filed October 29, 1976)

Comes now the Defendant, Morris Weintraub, and respectfully moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure to grant him Summary Judgment dismissing the within Complaint, with prejudice, for the following reasons:

1) The Plaintiff delayed in filing the within cause for a period in excess of twelve years from the date the levy was served (May 3, 1963), which delay has substantially prejudiced the Defendant and thus the Plaintiff's claim should be barred by reason of the equitable doctrine of laches.

2) The instant action is barred by the state of limitation, 26 USC § 6502, which provides that a proceeding in Court

to collect a tax must be begun within six (6) years of the date of assessment (May 2, 1963).

3 The record clearly indicates that the debt owed to Frank J. Andrews was paid and cancelled in May, 1962, one year prior to the assessment of the tax for which levy was made on the Defendant in May, 1963; thus, no material issue of fact exists and the Defendant would be entitled to Judgment as a matter of law.

Memorandum and Affidavits of Morris Weintraub, James L. Cobb, Jr. Attorney At Law, and Elsie M. Bartels, are attached hereto in support of said Motion.

COBB, COMBS & OLDFIELD
BY: /s/ WILLIAM C. OLDFIELD
211 East Fourth Street
Covington, Kentucky 41011

A. D. GOLDBERG
First National Bank Bldg.
Cincinnati, Ohio 45202

ATTORNEYS FOR DEFENDANT

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL ACTION NO. C-1-76-32

UNITED STATES OF AMERICA

PLAINTIFF

vs.

MORRIS WEINTRAUB

DEFENDANT

AFFIDAVIT OF MORRIS WEINTRAUB IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Filed October 29, 1976)

Affiant, Morris Weintraub, who is Defendant in the above-styled and numbered civil action, being first sworn, states:

1) That on or about September 6, 1960, he, together with his brother, E. A. Weintraub, as co-maker for the consideration of One Hundred Thirty-five Thousand ($135,000.00) Dollars then paid to Affiant, executed and delivered to one Frank J. Andrews their Promissory Note in said sum payable with interest to his order on demand upon which obligation Affiant, on May 22, 1961, paid to said Andrews the sum of Twenty Thousand ($20,000.00) Dollars, of which amount Fourteen Thousand Two Hundred Forty ($14,240.00) Dollars was credited to principal, the balance of Five Thousand Seven

Hundred Sixty ($5,760.00) Dollars to interest, thereby reducing the debt evidenced by said Note to One Hundred Twenty Thousand Seven Hundred Sixty ($120,760.00) Dollars plus interest from date of May 22, 1961.

2) The proceeds of the loan referred to in Paragraph (1) hereof were paid by Affiant on his and his brother's monetary obligation in respect to real estate located near Phoenix, Arizona.

3) Affiant and his brother were unable to meet Andrews' repeated requests for payment of the balance of debt aforesaid in currency and in lieu thereof and in complete satisfaction and discharge of same, Affiant and his brother, as the obligors on said Note, on May 8, 1962, and May 10, 1962, respectively, assigned, set over and transferred to said Andrews in the manner hereinafter set forth, a percentum of the interests of Affiant and his brother in said real estate, same being calculated upon the basis of the then investment of the Affiant therein as compared to said balance due upon said Note and the debt represented thereby.

4) The percentum calculation referred to in Paragraph (3) hereof was, at the request of Affiant and said Andrews, made by a certified public accountant, Mr. Sol Provisor, resulting in a determination of the interests of the Weintraubs to be so assigned at 77.18%, and pursuant thereto and on said date of May 8, 1962, formal assignment, as per copy attached, Exhibit "A", was executed at Newport, Kentucky, by Affiant and Andrews and the document on said date forwarded to Affiant's brother at Phoenix, Arizona, for execution by him, which was done.

5) On May 2, 1963, excise taxes and penalties in the amount of Six Hundred Eighty-eight Thousand Seven Hundred Thirty-four and 41/100 ($688,734.41) Dollars were assessed against said Andrews and others by the Internal Revenue Service of Plaintiff as is evidenced by the certificates of assessment (Internal Revenue Service Form 899), which is hereto

attached, Exhibit "B", and upon date of May 3, 1963, Notice of Levy (Internal Revenue Service Form 668-A), was by an agent of said service, Sylvester Loechle, served upon Affiant whereby it was requested of Affiant that he pay all monies owed by him to said Andrews to the Internal Revenue Service, or so much thereof as would be required to satisfy the amount of said levy. Thereafter on May 20, 1963, a final demand (Internal Revenue Service Form 668-C) was served upon Affiant again requesting such payment. Copies of said Notices of Levy and Final Demand are attached, Exhibits "C" and "D", and upon service thereof on each of said dates, Affiant stated to the Internal Revenue Service, by and through its agents, that no money was due or owing from Affiant to said Andrews.

6) Subsequent to the dates referred to in Paragraphs (4) and (5) hereof, Plaintiff herein procured the return of an Indictment by a Grand Jury sitting in and for the Eastern District of Kentucky and against Affiant and said Andrews, as said Indictment more fully appears from copy hereto attached, Exhibit "E", and upon trial thereof, Defendants therein were acquitted, the final entry of such acquittal having been entered on September 24, 1965.

7) From the period intervening between September 24, 1965, and January 22, 1976, the date of the filing of the Complaint herein, no action was undertaken by Plaintiff through any of its agencies to attempt the enforcement of said tax assessment either against Affiant, his brother, or the said Frank J. Andrews, or the estate of the said Andrews, although, as appears from copy of document furnished to Affiant by Plaintiff, it was in contemplation by Plaintiff that Andrews (Screw) was the equitable owner of property held for him by Foppe (Andrews' daughter and son-in-law) which Plaintiff would not pursue by civil action if the said Andrews would testify against Affiant (Morris) in exchange for leaving the Foppe property alone. The document referred to in this

paragraph is reproduced in its exact form employed by an agent of Plaintiff Government as follows:

(c) Foppe property
– get Screw to testify against Morris in exchange for Gov'ts leaving Foppe prop. alone. –

[Handwritten on original copy]

The person in said document referred to as "Screw" is Frank J. Andrews; the person referred to therein as Foppe" is either Andrews' daughter or his son-in-law, and the person referred to therein as "Morris" is Affiant, Morris Weintraub.

8) The cause of action set forth in the Complaint could at any time subsequent to said notice of levy and final demand on May 20, 1963, have been asserted by civil action by Plaintiff which had and has the effect of prejudicing Affiant in his defense thereto by delaying instituting same until January 22, 1976, thereby denying to Defendant the advantage of testimony of witnesses, now dead, whose evidence would have supported the allegations, both negative and affirmative, of his answer in this cause, said witnesses being Frank J. Andrews, who died December 21, 1974, Joseph F. Fisher, who died August 13, 1970, Winifred Weintraub, who died the Summer of 1971, and Daniel W. Davies, who died February 3, 1975:

A) As to the witness, Frank J. Andrews, who died December 21, 1974, Affiant states that if the said Frank J. Andrews could be called as a witness in this matter, he would testify, and it would be true, that the Agreement and Assignment annexed hereto as Exhibit "A" was, in fact, executed by the Affiant, Morris Weintraub, in May, 1962, and was, in fact, executed by Andrews in May, 1962, and that same was accepted by said Frank J. Andrews in satisfaction of a debt arising out of a loan

made to the Affiant, Morris Weintraub, in the initial amount of One Hundred Thirty-five Thousand ($135,000.00) Dollars in September, 1960. Further, the said Frank J. Andrews would testify, and it would be true, that in May, 1963, and at no time since May, 1962, was Morris Weintraub indebted in any manner whatsoever to said Frank J. Andrews.

B) With respect to the death of Daniel W. Davies, who died February 3, 1975, while Mr. Davies would not have been called as a witness, he represented the Affiant in the trial of Indictment No. 10417, and was at that time and continued to be conversant with all the essential facts surrounding the instant litigation. Had this litigation been brought within a reasonable period after the conclusion of the criminal matter in September, 1965, the said Daniel W. Davies would have represented this Affiant. As a result of Mr. Davies' death, the Affiant has been required to obtain other counsel who are not as conversant with the facts involved and who are limited in their exploration of said factual matters by the inability of this Affiant to remember all the details surrounding several years of involved transactions and because this Affiant since his acquittal in September, 1965, has disposed of or lost many vital documents which would assist not only in the preparation of his defense, but in refreshing his memory of events long since past.

9) The delay of twelve years and about eight months in the commencement of this civil action secures to Plaintiff an advantage denied it during the lifetime of said persons herein named who by their evidence in behalf of Defendant would have supported his contentions herein. During said period of time from May, 1963, to January, 1976, Affiant has twice moved his offices and once changed his residence wherein records vital to his defense were stored and some of same have, during said interval, been lost, misplaced or in

some instances disposed of and which were and are vital to Defendant's defense to this civil action.

10) Documents furnished Affiant through discovery process herein disclose no information, or leads to information, unavailable to Plaintiff throughout said period from May, 1963, to date.

11) Affiant says further that the issue framed by the pleadings herein has been heretofore determined adversly to Plaintiff in that certain cause styled United States of America vs. Morris Weintraub and Frank J. Andrews formerly pending in the United States District Court for the Eastern District of Kentucky and numbered 10,417, and Defendant, as alleged in his Answer in this case, says that Plaintiff is estopped to relitigate same.

FURTHER AFFIANT SAYTH NOT.

/s/ MORRIS WEINTRAUB

COMMONWEALTH OF KENTUCKY
COUNTY OF KENTON, SS

SWORN TO AND SUBSCRIBED TO before me a Notary Public by the above named on this 22nd day of October, 1976.

/s/ DEBBIE FICKE
Notary Public – State at Large
My Commission Expires:

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-1-76-32

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MORRIS WEINTRAUB,
Defendant.

JUDGMENT

(Filed January 5, 1977)

This action came on for trial before the Court and a jury, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, United States of America, recover of the defendant, Morris Weintraub, the sum of One Hundred Twenty Thousand Seven Hundred Sixty Dollars ($120,760.00).

Dated at Cincinnati, Ohio, this 5th day of January, 1977.

APPROVED:

/s/ CARL B. RUBIN
United States District Judge

JOHN D. LYTER
Clerk of Court

BY: /s/ REBECCA J. ELLIS
Deputy

APPENDIX F

No. 77-3273

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MORRIS WEINTRAUB, *Defendant-Appellant.*	APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed December 19, 1979

CELEBREZZE, Circuit Judge, delivered the opinion of the Court and KEITH, Circuit Judge, (pp. 38a-41a herein) joined by filing a separate, concurring opinion. MERRITT, Circuit Judge, (pp. 41a-44a) filed a dissenting opinion.

Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges.

CELEBREZZE, Circuit Judge. This appeal concerns the rule *nullum tempus occurrit reqi* — the sovereign is exempt from the consequences of laches and the operation of statutes of limitations. The rule is of ancient origin and, while its original rationale of royal prerogative no longer holds sway, the maxim remains vital based upon the public policy of preserving public rights and revenues from the neglect of public officers. This principle causes us to affirm a civil tax judgment in favor

of the United States in the face of an argument that the action was time-barred.

I.

The facts involved in this cause are somewhat complicated but can be fairly distilled as follows. Defendant-appellant, Morris Weintraub, is a Kentucky attorney. In 1959 appellant and his brother, Erving Weintraub, obtained interests in two parcels of real estate in Arizona, which they hoped to resell at a profit.[1] They had difficulty making the scheduled payments for this land. Among other means employed to shore up their financing, in 1960 appellant and his brother borrowed $135,000 from Frank Andrews, a client of appellant, and made a required payment.[2]

Loans had previously been received from two other individuals, Messrs. Chalfen and Hecht, who secured their loans by having partial interests in both parcels assigned to them.[3] Despite several extensions of time appellant and his brother were still unable to make the payments on the parcels or otherwise dispose of them, so in 1961 further loans were obtained from Chalfen and Hecht.[4] .In exchange Chalfen and Hecht obtained a complete assignment of all interests in both

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[1] One parcel was in the name of appellant and his wife, but it was understood that appellant's brother had a one-third interest in it.

[2] The loan was evidenced by a note signed by appellant and his brother bearing six percent interest. The note recited that it was secured by the Arizona real estate, (App. 659), but it does not appear that Andrews ever recorded any such "security interest," (App. 696-97). *See* note 3, *infra.*

[3] One parcel had been purchased under an Agreement of Trust and the other under an installment contract, with the latter parcel eventually assigned to another trust. Thus, the interests in the real estate were often "assigned" rather than "conveyed." The interests could be redeemed from the trusts by repayment of the loans.

[4] The loans took the form of Chalfen and Hecht making the payments appellant and his brother were required but unable to make.

parcels.[5] Other than a payment in 1961 on the note to Andrews,[6] no other payments were made by appellant or his brother. In May 1962 appellant and his brother were sued in Arizona state court by Chalfen and Hecht. Pursuant to the settlement of that lawsuit in November 1962, appellant and his brother executed a deed and assignment of all their interests in the two real estate parcels to Chalfen and Hecht.[7]

On May 2, 1963, the Internal Revenue Service (IRS) assessed wagering taxes in the amount of $688,734 against Frank Andrews. On May 3, 1963, the IRS served appellant with a notice of levy on the property of Andrews (and others), pursuant to Internal Revenue Code § 6332,[8] which requires third

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[5] There is a dispute as to whether this assignment was "absolute" or more like a "security interest." *See* note 18, *infra*, and accompanying text.

[6] This payment reduced the principal balance on the note to $120,760.

[7] The judgment entry provided that "Chalfen is the absolute owner in fee simple, subject only to the equities of . . . Hecht [and others]," of both parcels. Appellant and his brother had an option to repurchase the land until March 10, 1963, which option was never exercised. (App. 678-83).

[8] I.R.C. § 6332 provides:

> (a) **Requirement.**—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.
>
> (b) **Special rule for life insurance and endowment contracts.**—
>
> (1) **In general.**—A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary or his delegate for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary or his delegate that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.
>
> (2) **Satisfaction of levy.**—Such levy shall be deemed to be satisfied if such organization pays over to the Secretary or his delegate the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323(i)(1)) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.
>
> (3) **Enforcement proceedings.**—The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.
>
> (c) **Enforcement of levy.**—
>
> (1) **Extent of personal liability.**—Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at an annual rate established under section 6621 from the date of such levy (or in the case of a levy described in section 6331(d)(3), from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer). Any amount (other than costs) recovered under this paragraph shall be credited

persons in possession of a taxpayer's property or property rights subject to levy upon which a levy has been made to surrender such to the IRS. Appellant replied in August 1963 to the final demand for surrender of the amount he owed to Andrews by writing on the final demand: "Nothing due or owed by me to Any of above at time of service on 5/2/63 or now." (App. 695).

The next action taken against appellant was in April 1964, when appellant was indicted for willfully failing to honor the notice of levy and two counts of making false statements to the IRS. Appellant was acquitted on all three counts after trial in September 1965.

No further action was taken by the IRS vis-a-vis appellant until the filing of the complaint in the instant case in January 1976. This action was brought pursuant to § 6332(c) to enforce the personal liability of appellant for failure to honor the

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against the tax liability for the collection of which such levy was made.

(2) **Penalty for violation.**—In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d) **Effect of honoring levy.**—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary or his delegate, surrenders such property or rights to property (or discharges such obligation) to the Secretary or his delegate (or who pays a liability under subsection (c)(1) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

(e) **Person defined.**—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, which as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Subsections (b), (c)(2) and (d) were added to § 6332 by the Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125. Subsection (c)(1) was slightly modified subsequently in a way not material to the instant case. P.L. 93-625, 88 Stat. 2115; P.L. 94-455, 90 Stat. 1710.

notice of levy served upon him in May 1963.[9] Appellant moved for summary judgment in the district court arguing, *inter alia*, that the suit was barred by laches and the statute of limitations. This motion was denied without opinion. At trial, the sole issue for the jury to determine was whether appellant was, in fact, indebted to Andrews on May 3, 1963, when he was served with the notice of levy. The jury found that appellant was so indebted[10] and found in favor of the government in the amount of $120,760.[11] See 77-2 U.S.T.C. ¶ 9576 (S.D. Ohio 1977).

Appellant's defense at trial was simply that he was not indebted to Andrews on May 3, 1963, and thus was not then in possession of any of Andrews' property or property rights. This would have absolved appellant of liability for refusal to honor the notice of levy. He admitted that he received the $135,000 loan from Andrews in 1960. But he contended that he had satisfied that debt in May 1962 by transferring to Andrews a 77% interest in the two Arizona land parcels. As evidence of this appellant pointed to two documents dated May 1962. The first was labelled "Assignment" and purported to transfer the 77% interest from appellant and his brother to Andrews. The second was labelled "Agreement and Assignment" and purported to embody an agreement between appellant, his brother and Andrews that Andrews would accept

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[9] "The proceeding authorized is not an action in rem, nor is it a suit for the collection of a tax. It is a suit to enforce personal liability for failure to surrender property belonging to a delinquent taxpayer." *Commonwealth Bank* v. *United States*, 115 F. 2d 327, 330-31 (6th Cir. 1940).

See generally United States v. *Euclid Nat'l Bank*, 510 F.2d 461 (6th Cir. 1975).

[10] There is no merit to appellant's argument that he was denied due process because the jury deliberated only 150 minutes. He has cited no authority in favor of such a proposition, nor do we know of any.

[11] This was the principal balance of the note as of May 3, 1963. *See* note 6, *supra*. It is unexplained why the judgment did not include accrued but unpaid interest on the note or statutory interest from the date of levy. *See* § 6332(c)(1).

the 77% interest in the Arizona land in satisfaction of the $135,000 loan.

The government successfully argued, however, that these documents were not what they purported to be. The "Assignment," which had a place for both appellant's and his brother's signatures, was signed only by appellant in May 1962. (App. 548). The "Agreement and Assignment," which had a place for appellant's, his brother's and Andrews' signature, was signed only by appellant and Andrews in May 1962.[12] (App. 549-50). Thus, the documents were ineffective to transfer any interest in the reality to Andrews in May 1962 since the necessary signature of appellant's brother was missing on each.[13] While appellant's brother did eventually sign copies of both documents, (App. 488-90), it is conceded by appellant that this did not occur until May or June 1963, after the notice of levy had been served on appellant, and that the documents were back-dated to May 1962 by appellant's brother at appellant's request.[14] Thus, the documents were still ineffectual to transfer any interest to Andrews in May 1962 or anytime before May 3, 1963.[15]

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[12] The government has suggested that Andrews never signed this document, or at least not in May 1962. The government concedes that appellant probably signed this or a related document in May 1962. *See* note 15, *infra*.

[13] Any fair reading of the documents indicates appellant's brother's signature was necessary. In the alternative, the jury would have been entitled to conclude that Andrews never signed the "Agreement and Assignment" or even that appellant did not sign it in May 1962. *See* note 12, *supra*.

[14] There is no merit to appellant's contention that the district court erred in excluding these back-dated versions of the documents. The district court acted within its discretion in excluding these doctored potentially confusing exhibits.

[15] Moreover, there was no provision on either document for appellant's wife to sign even though she was partial record owner of one parcel. *See* note 1, *supra*. It does appear that appellant and his wife both signed "Applications to Assign" one parcel in May 1962 but there was no indication that these documents were ever delivered, filed or otherwise utilized. (App. 698-99).

Other evidence submitted by the government attested to the ersatz nature of the "Assignment" and "Agreement and Assignment." In a letter to Chalfen in April 1963, eleven months after appellant allegedly satisfied his debt to Andrews, appellant wrote: "As you know, I borrowed $135,000.00 from Frank Andrews and if it takes the rest of my life to repay him, I will just have to do it." (App. 687). And in May 1963, just after the notice of levy was served on appellant, he wrote the following to his brother:

> Here are 3 things:
>
> 1. • • •
>
> 2. NOTICE OF LEVY served on my Friday. . However, you will recall that Andrews notified us he had transferred the note to MIKE MAZZARO, a relative of his who lives near Pittsburgh. That was some time ago . . . you can't recall, but it was done. This in case an IRS agent happens to call on you. In other words Andrews has no further interest in the note—his relative Mazzaro owns it. I inform you because they may serve you as the note was signed by both of us, so you will know. I was afraid of this right along as I kept telling you. But I think it is O.K.
>
> 3. NOTICE OF FEDERAL TAX LIEN, etc. which you will note the original is being filed in Maricopa County, but I talked to you on phone about this.
>
> RETURN THESE AT ONCE TO ME. AT ONCE. TEAR UP THESE NOTES, PLEASE . . . as soon as you read them . . . don't leave lay around house.
>
> • • •
>
> Erv, please, get me back those papers from Bellemack-if he has them. He indicates you have. You think I have been handing you a line, but you can see that what I have been telling you is so . . . return these enclosed to me, and then get those papers and mail back to me separately, or if will be there Friday, have ready for me and I will take back with me . . .

THIS IS SERIOUS. . . .

TEAR THIS UP WHEN FINISHED READING.

(App. 692-93. Errors in Original.)[16]

Appellant's instructions to have this communication destroyed obviously were not followed and equally obvious is the letter's import. Other documentary evidence submitted by the government also was inconsistent with appellant's contention that he had satisfied his debt to Andrews by May 3, 1963.[17]

The government further argued at trial that the alleged May 1962 assignment of the land to Andrews was impossible because appellant had no interest in either parcel at that time which he could have assigned. Both parcels had been completely assigned to Chalfen and Hecht by 1961. While appellant argued that these assignments were in the nature of a security interest or mortgage to secure Chalfen's and Hecht's loans, the government pointed to documentary evidence which indicated that the transfer to them was absolute and in satisfaction of their loans. (App. 635; 637; 656). This was confirmed by the settlement of the 1962 lawsuit which yielded a complete transfer by appellant and his brother of all interests in the two parcels to Chalfen and Hecht.[18] (App. 666-70). Indeed, it is implausible that appellant and his brother actually transferred a 77% interest in the real estate to Andrews in May 1962 in light of their settlement agreement in November

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[16] There was some suggestion in appellant's testimony that he concocted the story about Andrews transferring the note to Mazzaro in order to delude appellant's brother's wife and that the instructions to destroy the note were put in at his brother's request. (App. 258-64). The jury was entitled to disbelieve this implausible explanation.

[17] For example, in June 1962 Andrews wrote to the trustee of the trusts containing the real estate parcels: "I hereby absolutely and irrevocably waive and release any and all right, title, interest, lien, claim or demand that I may now have or that may arise hereafter against those [parcels.]" (App. 696-97).

[18] Appellant and his brother did retain an option to repurchase the land, which option eventually expired. *See* note 7, *supra.*

1962 to transfer a 100% interest in the same real estate to Chalfen and Hecht.

We find there was substantial evidence to support the jury's verdict. The evidence more than sufficed to allow the jury to conclude that appellant was indebted to Andrews on May 3, 1963. Appellant's contention that the verdict was "contrary to and not supported by the evidence" is wholly without merit.[19]

II.

The principal contention raised by appellant before this court is that this action was time-barred by both laches and the statute of limitations. We find no merit to either branch of this claim.

The rule that the government is exempt from the consequences of its laches and from the operation of statutes of limitations — *nullum temput occurrit regi* — had its genesis in English common law notions of prerogative of the Crown. The principle is well established in this country, but based upon the important public policy of preserving public rights and revenues from the negligence of public officers. *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132-33 (1938).[20]

Despite overwhelming authority to the contrary, appellant argues that this is a case in which the sovereign should be barred by laches. He notes the almost eleven year delay between his acquittal on the criminal charges in 1965 and the

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[19] The resolution of this case turned in substantial part on appellant's credibility, which was solely within the province of the jury. The government's brief points to two examples of deceit by appellant which could have graphically demonstrated to the jury that appellant was not very credible. (U.S. Br. at 30-31).

[20] This is to be distinguished from "a case relating to the application of the law merchant as to the transfer of negotiable paper [and] the incurring by the United States of certain responsibilities by becoming a party to such paper." *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940). *See also Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369 (1943).

filing of this action in 1976 – and the almost thirteen year delay since service of the notice of levy in 1963. Appellant claims that during this delay he destroyed most of his records concerning this matter. Appellant's brother, who has since died, was in failing health at the time of trial and remembered little of what happened. The IRS special agent who worked on appellant's criminal case, appellant's attorney in the criminal case, appellant's brother's wife and, importantly, Andrews had all died by the time this action was commenced.

Appellant argues that the Supreme Court's decision in *Costello* v. *United States*, 365 U.S. 265 (1961), leaves open the door to making a laches argument ever so slightly. In *Costello* the Court noted cases that had "applied the principle that laches is not a defense against the sovereign" and stated "[t]his Court has consistently adhered to this principle." *Id.* at 281. But because the Court had never so held in the type of case at issue there (denaturalization), it went on to say that even if laches applied the petitioner had failed to prove the elements of the defense. *Id.* at 282. Appellant contends that the fact that the Court at least considered laches in *Costello* suggests that in a proper case it could be a defense against the sovereign.

We disagree with this reading of *Costello*. The language quoted above admits to no exceptions to the rule that laches cannot defeat the government. This rule is of such long standing that we do not believe the Supreme Court would carve out an exception to it without expressly saying so. The fact that the Court did analyze, and reject, the laches argument in *Costello* was more in the nature of an alternative holding which did not detract from the primary holding that laches was inapplicable.

Moreover, even if we were to agree that *Costello* left the door slightly open to a laches defense here, as in *Costello* the crack is not wide enough to allow appellant inside. "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party

asserting the defense." *Id.* There is no question that it would have been preferable, from all viewpoints, for the government to have filed this action sooner than it did. But it cannot be said that there was a lack of diligence by the IRS sufficient for a laches defense inasmuch as the IRS was attempting between 1963 and 1976 to collect from Andrews the taxes he owed, upon which appellant's liability was predicated.[21] Indeed, it was completely reasonable for the IRS to proceed initially against Andrews since collection from him could have obviated this proceeding. And the prejudice appellant argues he has suffered is speculative, at best, and certainly was no greater than the prejudice to the government in trying its case. *See id.* at 282-83. This case was based almost entirely upon documentary evidence and, to a lesser extent, appellant's credibility, neither of which were greatly affected by the lapse of time. Finally, laches is an equitable defense and, putting to one side the fact that this is a legal action for damages, it can certainly be raised only by one who comes into equity with clean hands.[22] The letter noted above sent by appellant to his brother, containing instructions on defrauding the IRS, was more than enough to soil appellant's hands.

Appellant next argues that this case is barred by the statute of limitations. While the general rule stated above is that the sovereign is exempt from the operation of statutes of limita-

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[21] The IRS also sought, unsuccessfully, to collect Andrews' tax liabilities from Mazzaro. *See* note 16, *supra*, and accompanying text.

[22] Laches is purely an equitable doctrine. See *generally* 27 Am. Jur. 2d *Equity* § 153. A venerable equitable maxim is that "He who comes into equity must come with clean hands." *See* 30 C.J.S. *Equity* § 93. The clean hands maxim is typically employed by a defendant against a plaintiff who seeks equitable relief, but it applies equally to a defendant who seeks equitable relief from the chancellor. *See id.* § 96. While it is not normally employed against a defendant merely brought to court by the suit of another, insofar as appellant seeks to invoke the powers of the chancellor to bar the government's claim due to laches, we believe the clean hands maxim should apply to him. *See id.*

tions, an exception to that general rule exists when the sovereign (through the legislature) expressly imposes a limitation period upon itself. *Guaranty Trust, supra,* 304 U.S. at 133; *United States* v. *Frank B. Killian Co.,* 269 F.2d 491, 494 (6th Cir. 1959).[23] Thus, the issue at hand is whether Congress has imposed a statutory limitation period on suits to enforce the personal liability imposed by § 6332 on persons who refuse to honor a notice of levy. We find no such limitation applicable to § 6332.

The only statute urged by appellant as applicable is Internal Revenue Code § 6502.[24] This section requires that the IRS commence action to collect a tax, either by levy or pro-

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[23] It is true today, as when Mr. Justice Gray wrote for the Court in United States v. Nashville, etc. R. Co., 1886, 118 U.S. 120, 6 S.Ct. 1006, 30 L.Ed. 81, "that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless congress has clearly manifested its intention that they should be so bound." 118 U.S. at page 125, 6 S.Ct. at page 1008; see: Board of Com'rs of Jackson County v. United States, 1939, 308 U.S. 343, 351, 60 S.Ct. 285, 84 L.Ed. 313; Guaranty Trust Co. of New York v. United States, 1938, 304 U.S. 126, 132-133, 58 S.Ct. 785, 82 L.Ed. 1224.

United States v. *Frank B. Killian Co.,* 269 F.2d at 494.

[24] I.R.C. § 6502 provides:

(a) **Length of period.**—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreement in writing made before the expiration of the period previously agreed upon. The period provided by this subsection during

ceeding in court, within six years after the assessment of the tax. Section 6502 only concerns actions against taxpayers, however, and not actions under § 6332 against third parties in possession of a taxpayer's property or property rights.

Appellant has cited absolutely no authority in support of his contention that the six year limitation of § 6502 applies to § 6332 and we have found none.[25] While we have found no case expressly holding that § 6502 is not applicable to § 6332, there is substantial authority which points to the conclusion that it is not.

First, for a statute of limitations to apply to the sovereign it must be expressly indicated in the statute. *Guaranty Trust, supra,* 304 U.S. at 133; *Frank B. Killian Co., supra,* 269 F.2d at 494. There is no express mention of § 6332 in § 6502 nor is the type of action brought under § 6332 even implicitly described in the language of § 6502. By its own terms, the limitation of § 6502 applies only to actions to collect a tax. The instant case, under § 6332, is not to collect a tax (although that is the intended indirect consequence of the suit), but rather is to enforce the personal liability for failure to surrender property after receiving a notice of levy.[26]

Second, this court and others have held that a person served with a notice of levy under § 6332 (or its predecessor) has

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which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against the taxpayer.

(b) **Date when levy is considered made.**—This date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335(a) is given.

Subsection (a) was modified slightly, in a manner not here relevant, by the Federal Tax Lien Act of 1966. P. L. 89-719, 80 Stat. 1146.

[25] The only case cited by appellant, *United States* v. *Home Beneficial Life Ins. Co.,* 73-1 U.S.T.C. ¶ 9345 (E.D. Tenn. 1973), was a case in which the government sought to enforce a garden variety lien and there was no mention in the opinion of § 6332 or its provisions.

[26] *See* note 9, *supra,* and note 32, *infra.*

only two possible defenses: 1) he is not in possession of property or a property right of the taxpayer;[27] or 2) the property is subject to prior judicial attachment or execution.[28] *Commonwealth Bank* v. *United States*, 115 F.2d 327, 330 (6th Cir. 1940). *See United States* v. *Sterling Nat'l Bank & Trust Co.*, 494 F.2d 919, 921 (2d Cir. 1974) (*citing cases*); *United States* v. *Trans-World Bank*, 382 F.Supp. 1100, 1105 (C.D. Cal. 1974) (*citing cases*); *United States* v. *Polan Indus., Inc.*, 196 F.Supp. 333 (S.D. W.Va. 1961); *United States* v. *American Exchange Irving Trust Co.*, 43 F.2d 829 (S.D. N.Y. 1930). *See also United States* v. *Diamond*, 142 F.Supp. 441, 444 (S.D. N.Y. 1956). This indicates that the statute of limitations is *not* a defense to a § 6332 suit.[29] While not analyzing the predecessor of § 6502, this was the precise holding of the *American Exchange* case.

Third, a review of the cases decided under § 6502 and its predecessor reveals that they uniformly concern actions against taxpayers and not third parties like appellant. And it is significant that these cases consistently hold that the only limitation of § 6502 is that the levy be made or proceeding in court begun against the taxpayer within six years of the assessment. There is no time limit whatsoever on an action against the taxpayer to enforce a timely levy or judgment obtained in a timely filed court proceeding.[30] Thus, even if

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[27] This defense was resolved adversely to appellant by the jury.

[28] This defense was not raised by appellant. Section 6332(a) also contemplates a similar defense that the property is not "subject to levy," which presumably refers to exempt property.

[29] It is also no defense that there was no valid levy against the taxpayer. That is a matter for the taxpayer to raise. *Commonwealth Bank* v. *United States*, 115 F.2d 327, 329 (6th Cir. 1940). *Compare* I.R.C. § 7426(c).

[30] *Moyer* v. *Mathis*, 458 F.2d 431, 434 (5th Cir. 1972) (foreclosure suit twenty years after timely lien not time-barred); *United States* v. *Overman*, 424 F.2d 1142, 1147 (9th Cir. 1970) (foreclosure suit six years after judgment in timely suit not time-barred; tax liens are enforceable at *any time*); *Plisco* v. *United States*, 306 F.2d 784, 786 n.1

§ 6502 could somehow be construed to apply to § 6332, its sole limitation period has been complied with by virtue of the timely levy against Andrews.[31] There is no limitation in § 6502 for enforcement actions, like the instant case, once the liability has been established, which occurred here by service of the notice of levy on appellant.[32]

Fourth, a review of the cases decided under § 6332 demonstrates that the procedures contemplated by § 6332 are consistent with there being no limitation period on actions to enforce a notice of levy. When a third party, like appellant, in

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(D.C. Cir. 1962), *cert. den.* 371 U.S. 948 (1963) (§ 6502 requires only levy or suit within six years of assessment and does not limit means for enforcing assessment); *Hector* v. *United States*, 255 F.2d 84 (5th Cir. 1958) (suit filed within six years of assessment tolls limitation period *indefinitely*); *United States* v. *Ettelson*, 159 F.2d 193, 196 (7th Cir. 1947) (claim filed in probate court within six years of assessment sufficient to toll limitation period and judgment could be enforced *anytime* thereafter; there is no federal statutory provision as to period of limitation on enforcing judgment); *Investment & Securities Co.* v. *United States*, 140 F.2d 894, 896 (9th Cir. 1944) (no federal statutory limitation on enforcing judgment in timely suit; tax can be collected *at any time*); *United States* v. *Mandel*, 377 F.Supp. 1274, 1276-77 (S.D. Fla. 1974) (follows *Moyer*); *United States* v. *American Cas. Co.*, 238 F.Supp. 36, 38-39 (W.D. Ky. 1964) (follows *Ettelson*); *United States* v. *Caldwell*, 74 F.Supp. 114 (M.D. Tenn. 1947) (no time limit on enforcing lien acquired in timely suit); *United States* v. *First Nat'l Bank*, 54 F.Supp. 351 (N.D. Ohio 1943) (same as *Ettelson* and *American Cas. Co.*).

[31] Even if the levy against Andrews were not timely, appellant could not raise that issue. *See* note 29, *supra*.

[32] The instant case is to be distinguished from one against a third party pursuant to I.R.C. §§ 6901, *et seq.*, wherein the liability of the third party is based upon being a transferee of the taxpayer. Transferee liability applies to a third party who stands in the shoes of a taxpayer and is imposed in a direct action to collect the tax due. In such a case, the six year limit of § 6502 applies to the transferee-third party. *United States* v. *Updike*, 281 U.S. 489 (1930). But the instant case is not an action to collect a tax and does not seek to impose transferee liability on appellant, so *Updike* is inapposite. *Hall* v. *United States*, 403 F.2d 344 (5th Cir. 1968), *cert. den.* 394 U.S. 958 (1969); *United States* v. *Oscar Frommel & Bro.*, 50 F.2d 73 (2d Cir.), *cert. den.* 284 U.S. 647 (1931).

possession of the property of a taxpayer is served with a notice of levy on the taxpayer's property, the appropriate procedure is that the third party immediately surrender the property to the IRS.[33] *See Flores* v. *United States*, 551 F.2d 1169, 1174 (9th Cir. 1977) (". . . the purpose of the statute [§ 6332] is a coercive one which seeks to foster swift tender of property which has been levied upon."); *Determan* v. *Jenkins*, 111 F.Supp. 604 (N.D. Ga. 1953); *United States* v. *American Exchange Irving Trust Co.*, 43 F.2d 829 (S.D. N.Y. 1930). *See generally* Treas. Reg. § 301.6332-1(c). This is in accord with the principle that service of the notice of levy reduces the property or property right (such as the intangible debt in the instant case) to the constructive possession of the United States. *See In re Cherry Valley Homes, Inc.*, 255 F.2d 706, 707 (3d Cir.), *cert. den.*, 358 U.S. 864 (1958) (*citing cases*). *See also Phelps* v. *United States*, 421 U.S. 330, 334, 337 (1975). Since the notice of levy served on appellant reduced the debt owed to Andrews to the constructive possession of the United States, it would make no sense to impose a time limit upon bringing an action to enforce the notice of levy, which appellant wrongfully failed to honor, to reduce the property right to the actual possession of the United States.

The appropriate remedy for one in appellant's position, upon whom a notice of levy has been served which he believes to be wrongful, is to surrender the property and bring an action against the government pursuant to Internal Revenue Code § 7426.[34] Such a lawsuit is the appropriate vehicle for one

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[33] Surrender of the property to the IRS acts as a discharge of the liability to the taxpayer. § 6332(d). The same rule applied before the enactment of subsection (d) in 1966. (*See* note 8, *supra.*) *United States* v. *Bowery Savings Bank*, 297 F.2d 380 (2d Cir. 1961); *Hoye* v. *United States*, 277 F.2d 116, 120 (9th Cir. 1960); *United States* v. *Eiland*, 223 F.2d 118, 121-22 (4th Cir. 1955).

[34] I.R.C. § 7426 provides:

> (a) **Actions permitted.—**
>
> (1) **Wrongful levy.**—If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.
>
> (2) **Surplus proceeds.**—If property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale may bring a civil action against the United States in a district court of the United States.
>
> (3) **Substituted sale proceeds.**—If property has been sold pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of a sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in a district court of the United States.
>
> (b) **Adjudication.**—The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:
>
> (1) **Injunction.**—If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.
>
> (2) **Recovery of property.**—If the court determines that such property has been wrongfully levied upon, the court may—
>
> (A) order the return of specific property if the United States is in possession of such property;
>
> (B) grant a judgment for the amount of money levied upon; or
>
> (C) grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property.

other than a taxpayer who wishes to contest the propriety of a levy on property in which he claims an interest. Such re-

lief is applicable to proceedings under § 6332. Treas. Reg. § 301.6332-1(c). While this statutory remedy under § 7426

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(3) **Surplus proceeds.**—If the court determines that the interest or lien of any party to an action under this section was transferred to the proceeds of a sale of such property, the court may grant a judgment in an amount equal to all or any part of the amount of surplus proceeds of such sale.

(4) **Substituted sale proceeds.**—If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325 (b) (3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

(c) **Validity of assessment.**—For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid.

(d) **Limitation on rights of action.**—No action may be maintained against any officer or employee of the United States (or former officer or employee) or his personal representative with respect to any acts for which an action could be maintained under this section.

(e) **Substitution of United States as party.**—If an action, which could be brought against the United States under this section, is improperly brought against any officer or employee of the United States (or former officer or employee) or his personal representative. the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action was commenced upon proper service of process on the United States.

(f) **Provision inapplicable.**—The provisions of section 7422(a) (relating to prohibition of suit prior to filing claim for refund) shall not apply to actions under this section.

(g) **Interest.**—Interest shall be allowed at an annual rate established under section 6621—

has been available only since 1966,[35] before then appellant had available an equivalent judicially-created remedy in which he could have contested the propriety of the notice of levy. *Bullock* v. *Lathm*, 306 F.2d 45 (2d Cir. 1962); *Seattle Ass'n of Credit Men* v. *United States*, 240 F.2d 906 (9th Cir. 1957); *Long* v. *Rasmussen*, 281 F. 236, 238 (9th Cir. 1922). *See Glenn* v. *American Surety Co.*, 160 F.2d 977, 981 (6th Cir. 1947). The ultimate issue which would have been decided in any lawsuit, *viz.*, whether appellant owed Andrews anything on May 3, 1963, is the same issue that was decided in this cause.

The judgment of the district court is affirmed.

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(1) in the case of a judgment pursuant to subsection (b)(2)(B), from the date the Secretary receives the money wrongfully levied upon to the date of payment of such judgment: and

(2) in the case of a judgment pursuant to subsection (b)(2)(C), from the date of the sale of the property wrongfully levied upon to the date of payment of such judgment.

(h) **Cross reference.—**

For period of limitation, see section 6532(c).

An action under § 7426 would be predicated upon denial of IRS administrative relief which is authorized under I.R.C. § 6343. *See* Treas. Reg. § 301.6332-1(c).

[35] Section 7426 was added by the Federal Tax Lien Act of 1966. P.L. 89-719, 80 Stat. 1142. It was subsequently slightly modified in a way not here relevant. P.L. 93-625, 88 Stat. 2115; P.L. 94-455, 90 Stat. 1834. Section 6343, however, was a part of the 1954 Code.

KEITH, Circuit Judge, concurring. I concur in part I and most of part II of Judge Celebrezze's well-done opinion.

It is with reluctance that I vote to affirm. There is no reasonable excuse for the government's long delay in proceeding to collect against the defendant. Nonetheless, I must agree that established case law makes laches unavailable here to halt the government's suit.

The statute of limitations question is closer, however. I.R.C. § 6502 provides a six-year statute of limitations from the date of assessment to the levy of "any tax." Judge Celebrezze states that the government action in this case was not to collect a tax, "but rather is to enforce the personal liability for failure to surrender property after receiving a notice of levy." This is literally true. However, I would construe § 6502 as applying to third-party enforcement actions under § 6332. The plain language of § 6502 states that "[any] tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun within six years after the assessment of the tax. . . ." It should make no difference whether collection of the tax is against the taxpayer himself or against a third-party who has the taxpayer's property. In my view, the situation under § 6502 is analogous to that of a transferee taxpayer. In *United States* v. *Updike*, 281 U.S. 489, 494 (1930), the Supreme Court held that the limitations period applied to a transferee taxpayer in language which is fully applicable here:

> It seems plain enough, without stopping to cite authority, that the present suit, though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees. The aim in the one case, as in the other, is to enforce a tax liability. . . . Indeed, when used to connote payment of a tax, it puts no undue strain upon the word "taxpayer" to bring within its meaning that persons whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax.

In my view, the six year limitations period should be deemed to run from the date of assessment of the tax against a third party; the IRS should have no more than six years to either seize the property or begin legal proceedings. It is true that this suggested construction results in some anomaly in that if the IRS obtains a judgment against the principle taxpayer, then no statute of limitations bar exists on enforcement of the judgment. The IRS can go after the taxpayer's property, almost wherever it is. This, however, is an anomaly which currently exists regarding transferee liability. *See Hall* v. *United States*, 403 F.2d 344 (5th Cir. 1968), *cert. denied*, 394 U.S. 958 (1969); *United States* v. *Oscar, Frommel & Bro.*, 50 F.2d 73 (2d Cir.), *cert. denied*, 284 U.S. 647 (1931).

On balance, I think that construing the statute in this manner is a fair way to harmonize the Internal Revenue Code and the multiplicitous fact situations which arise: 1) property is in the hands of the taxpayer – the IRS, by the express terms of § 6502 has six years from assessment to seize the taxpayer's property or file suit; 2) property is in the hands of a transferee taxpayer – *Updike* mandates compliance with § 6502; 3) property is in the hands of a third party such as the defendant, I don't think that the result should be different; § 6502 should apply as well.

Unfortunately, as Judge Celebrezze notes, this suggested construction does not help the defendant. The reason is that unlike real or personal property, the property in this case was an intangible debt owed by a third party (Weintraub) to the taxpayer. The government served a notice of "demand" upon the defendant third party pursuant to § 6322, requesting that he turn over to the government any money owed to taxpayer Frank J. Andrews. There is no doubt that this "demand" was

made within six years of the initial assessment against Andrews. The case law seems clear that the serving of this "demand" was the equivalent of a seizure of the debt and, as Judge Celebrezze says, "reduces the property or property right . . . to the constructive possession of the United States."

Were we writing on a clean slate, I would prefer requiring the government to bring suit within the six year limitations period, at least when dealing with an intangible debt. When dealing with real or personal property, the government can physically seize the property. However, as Judge Hastie said in *In re Cherry Valley Homes, Inc.*, 255 F.2d 706, 707 (3d Cir.), *cert. denied*, 358 U.S. 864 (1958), ". . . the possessory concept of 'seizure' is not strictly applicable to a debt. . . ." In such situations, I would hold the mere serving of a notice of "demand" insufficient to operate as a seizure and would require the government to file suit.

The case law, however, clearly establishes that the opposite is true. The serving of the notice of levy operates to reduce property or property rights to the constructive possession of the government. This was the effective holding of *Miller* v. *United States*, 78 U.S. 268, 297 (1870) where the Court stated that:

> In all cases where the garnishee is a debtor, or where the garnishment is of stocks, it is effected by serving notice upon the debtor, or corporation . . . . The service of an attachment, though it is but a notice, binds the debt or the stock in the hands of the garnishment, from the time of the service, and henceforward it is potentially in "gremio legis."

Although § 6332 uses the term "demand" instead of the term "levy," it is clear that a "demand" upon a third party operates as a levy or seizure so far as property rights are concerned. This has the effect of reducing the property or property rights to the constructive possession of the United States. *Phelps* v. *United States*, 421 U.S. 330, 335-37 (1975). *See*

Am. Acceptance Corp. v. *Glendora Better Builders*, 550 F.2d 1220, 1222-23 (9th Cir. 1977); *Matter of Rowand Co.*, 414 F. Supp. 1155, 1156-57 (E.D. Ark 1976) (Henley J.).

Given this authority, all that the government had to do to comply with the six year statute of limitations was to serve a timely levy (demand) upon the defendant debtor. There is no question that this was done. As Judge Celebrezze points out, *ante* at pp. 15-16, the government could then wait as long as it wished to bring the instant proceeding, over twelve years later, to enforce the constructive seizure of the debt accomplished by the initial demand. In effect, the government was collecting what it had constructively seized twelve years earlier. Judge Merritt whimsically argues that this construction of the statute is irrational. He is perhaps correct, but that is the law.

MERRITT, Circuit Judge, dissenting. The government's tax collection suit is time-barred and should be dismissed.

The relevant words of the applicable statute of limitations are simple:

> Where the assessment of any tax . . . has been made . . . such tax may be collected . . . by a proceeding in court, but only if . . . the proceeding [is] begun . . . within 6 years after the assessment of the tax . . . . 26 U.S.C. § 6502.

The facts are also simple. Weintraub owed a debt to Andrews. Andrews owed money to the IRS. The IRS assessed Andrews. Andrews did not pay the assessment. IRS sought to collect the tax from Weintraub by a process of garnishment or attachment of third party indebtedness allowed under § 6332 of the tax code. Upon receiving the garnishment, Weintraub reported to IRS that he owed no debt to Andrews.

Nothing happened for thirteen years. Then, thirteen years later, IRS decided to sue Weintraub to collect on its attachment of Weintraub's debt to Andrews.

The conclusion should be obvious. A tax garnishment attached Weintraub's debt to Andrews thirteen years before suit was filed. No "proceeding" to collect was instituted for thirteen years. Nothing in the statute of limitations excludes collection of garnishments or purports to limit its application only to a "proceeding" to collect the tax directly from the taxpayer who owes the money. The language of the statute says simply the tax may be collected by a proceeding in court *"within 6 years after the assessment."*

The consequences of a contrary conclusion are irrational. Under the Court's interpretation, the estate of a garnishee in the hands of his great, great-grandchildren must still pay the IRS 100 years after the six-year federal statute of limitations has run on the original tax bill, 100 years after the garnishment was answered and 100 years after the applicable state statute of limitations has run on the original indebtedness owed by the garnishee to the original creditor. The estate of the original creditor, the taxpayer who owed the money to the government in the first place, is free and clear because the six year statute ran against him long ago, but the poor garnishee – who (let us assume) religiously paid his own taxes all his life – remains forever liable for the taxes of another.

The Court reaches this anomalous result by holding that the statute, § 6502, "only concerns actions against taxpayers" and "not actions . . . against third parties in possession of a taxpayer's property or property rights," although it acknowledges that there is "no case expressly holding that § 6502 is not applicable." No attempt is made to discuss the irrational consequences of this conclusion. The Court does not even attempt to parse or analyze the language of the statute in order to justify the conclusion. It simply quotes "the rule *nullum tempus occurrit regi*" ("time does not run against the King") and combines it with a wonderful legal fiction, the doctrine of

"constructive possession" of personal property. The Court says:

> Since the notice of levy served on appellant reduced the debt owed to Andrews to the constructive possession of the United States, it would make no sense to impose a time limit upon bring an action . . . to reduce the property right to the actual possession of the United States.

Not even the common law during its darkest days of legal formalism and rigid adherence to fiction and abstraction took the doctrine of "constructive possession" this far. In the famous case of *Pierson* v. *Post*, 3 Caines 175, 2 Am. Dec. 264 (N.Y. 1805), the plaintiff with his hounds was in hot pursuit of a fox, *ferae naturae*, when the defendant intervened and in the sight of plaintiff shot and carried the fox away. The court put the question:

> [W]ho would keep a pack of hounds; or what gentelmen, at the sound of the horn and at peak of day would mount his steed, and for hours together, *'sub jove frigido'* pursue the winding of this wily quadruped, if, just as night came on, and his strategems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death and bear away in triumph the object of pursuit?

After so sympathetically describing the plaintiff's plight and "poring over Justinian, Fleta, Bracton, Puffendorph, Locke, Barbeyrac or Blackstone," for enlightenment, the Court holds that the doctrine of "constructive possession" does not apply because "the case . . . is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy [or control announced] by Puffendorph." The Court concludes that "however uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been," a contrary holding "would prove a fertile source of quarrels and litigation."

In the instant case, the Court's conclusion means that "quarrels and litigation" over tax claims with an omnipresent government will never end, even in the lifetime of our children's children unto the seventh generation. If the fox in *Pierson* v. *Post* was not in the constructive possession of the pursuer, I do not see so many years later why we should struggle with Shapespearean imagination to locate the money Mr. Weintraub owed to Mr. Andrews in the "constructive possession" of the government. Mr. Weintraub's fox was invisible, an incorporeal hereditament. If it ever existed, it was killed and skinned long ago. The trail has grown cold. The participants in the hunt who have not already died have grown old and forgotten the facts. After all these years, only the government's appetite for the chase remains. But in my judgment, they should sound the horn in other fields and send the hounds to follow trails which are not so stale, for *lex dilationes semper exhorret* ("the law abhors delay"), 2 Coke Inst. 240, is a better rule than *nullum tempus occurrit regi*.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-3273

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MORRIS WEINTRAUB,

Defendant-Appellant.

Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges.

JUDGMENT

(Filed December 19, 1979)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered the Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: February 13, 1980
COSTS: (to be awarded to appellee)

Filing fee	$ .....
Printing	$ 176.02
Total	$ 176.02

A True Copy.

Attest:

/s/ DOROTHY J. PHELAN
Deputy Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-3273

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MORRIS WEINTRAUB,
Defendant-Appellant.

ORDER

(Filed February 4, 1980)

Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges.

Defendant-appellant's motion for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, and it further appearing that the motion for rehearing is without merit,

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX I

26 USC

§ 6332. Surrender of property subject to levy

(a) Requirement.—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Special rule for life insurance and endowment contracts.—

(1) In general.—A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary or his delegate for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary or his delegate that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2) Satisfaction of levy.—Such levy shall be deemed to be satisfied if such organization pays over to the

Secretary or his delegate the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323 (i) (1)) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3) Enforcement proceedings.—The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c) Enforcement of levy.—

(1) Extent of personal liability.—Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy. Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) **Penalty for violation.**—In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d) **Effect of honoring levy.**—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary or his delegate, surrenders such property or rights to property (or discharges such obligation) to the Secretary or his delegate (or who pays a liability under subsection (c) (1)) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

(e) **Person defined.**—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation. Aug. 16, 1954, c. 736, 68A Stat. 784; Nov. 2, 1966, Pub.L. 89-719, Title I, § 104 (b), 80 Stat. 1135.